FORMER OPINION.

A former opinion of this Court on a collateral phase of this case is reported in *Miner et al.* v. *Atlass,* 363 U.S. 641.

JURISDICTION.

The judgment of the Court of Appeals was entered on June 30, 1965. On July 9, 1965, the Court of Appeals entered an order extending the time for filing a petition for rehearing to July 30, 1965. A timely petition for rehearing, filed July 29, 1965, was denied on September 28, 1965. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED.

1. When a district judge sitting in Admiralty, without a jury, has found an employer liable under the Jones Act (46 U.S.C. §688) for the deaths of his seamen-employees proximately caused by failure to provide a safe means of ingress to the vessel and the proofs with reason justify the district judge's conclusion that employer negligence played some part in producing the deaths, has the Court of Appeals in reversing the district judge and reaching its own conclusion that the seamen's deaths "were the result solely of their own gross misconduct" applied the standard of review required by *McAllister* v. *United States,* 348 U.S. 19, 20?

2. When an applicable Coast Guard regulation provides that "the life saving equipment on all vessels shall be so placed as to be readily accessible" and there is uncontradicted evidence that there was no life saving equipment in the vicinity of the 32 inch unbridged gap between the shipyard dock and the railbed of a marine railway upon which the vessel was temporarily located and

into which a seaman returning to the vessel fell and drowned, did the district judge properly reduce damages by reason of contributory negligence and did the Court of Appeals properly deny any recovery to the seaman's personal representative?

3. Does the conduct of a seaman in walking to a tavern ashore in the company of the employer's agent in charge of the crew and other crew members and there drinking alcoholic beverages and becoming helplessly intoxicated, bar the personal representative of the seaman from any recovery for the subsequent drowning of the seaman in such condition while returning to the vessel, or does the intervening agency of fellow crew members in taking the helpless seaman back to the vessel operate to render such conduct a remote cause, permitting full recovery if employer negligence played any part in the drowning?

Other issues were presented to the Court of Appeals but were not passed upon and although not forming the basis of this petition are believed to present important subsidiary questions. These are as follows:

(1) Does the Limitation of Liability Act protect the owner of a pleasure yacht who was also its master and operator from failure to perform his non-delegable duty of furnishing his employees with a safe place of employment when the owner knew or had an opportunity to know of hazardous conditions for access to his pleasure yacht and prior to the drownings of two of his employees, he left the vessel in charge of his agent, if at the time of the drownings of his employees he was not physically present?

(2) Does the requirement of Rule 51 of the Supreme Court Rules of Practice in Admiralty and Maritime Cases that an owner claiming the benefit of limitation of liability

"shall set forth the facts and circumstances on which limitation of liability is claimed" preclude the allowance of limitation on a petition which fails to allege either want of privity and knowledge or any facts from which such want of privity and knowledge could be found?

(3) May not a district court sitting in admiralty properly allow prejudgment interest with respect to part of damages not representative of future losses when the damages are based on claims under the Jones Act?

STATUTES AND REGULATIONS INVOLVED.

Statutory provisions involved are the Limitation of Liability Act, 46 U.S.C. §183-187 and the Jones Act, 46 U.S.C. §688, which incorporate by reference the Federal Employee's Liability Act, 45 U.S.C. §51-60. A Coast Guard Regulation, 46 CFR §25.25-15(a) is also involved. Their pertinent text is set forth in Appendix A, *infra*, pp 2a.

STATEMENT*

On April 22, 1957, H. Leslie Atlass, vice-president in charge of the Chicago office of Columbia Broadcasting System and the owner of a large 101 foot pleasure yacht brought a proceeding in admiralty in the United States District Court for the Northern District of Illinois under the Limitations of Liability Act, 46 U.S.C. §§ 183-189, for exoneration from or limitation of liability under the Jones Act, 46 U.S.C. §688, for the death by drown-

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* Abbreviated references are to the Appendix (App), Supplemental Appendix (Supp. App.) Reply Brief Appendix (Reply App.) filed for use of the Court below, to the Transcript of Proceedings (Tr.) part of the record below and to the Claimants' Exhibits (Ex.)

ing on October 26, 1956 of two seamen employed by him. The petition alleged, pursuant to Rules 51 and 54 of this Court's Rules of Practice in Admiralty and Martime Cases, that petitioner herein had theretofore on March 22, 1957, filed in the same district court an action under the Jones Act. (App. 4)

The seamen's personal representatives, one being petitioner herein, the other being petitioner in Number ....., appeared as claimants (App. 7, 9) and answered (App. 8, 10) alleging that the drownings were proximately caused by the negligence of their employer in failing to provide a safe, adequately lighted means of ingress and in failing to take proper and adequate care and control for the seamen's safety (App. 12-13). After a trial in 1963 and 1964 the district judge, sitting in admiralty without a jury, found that Clem Muth, petitioner's decedent, while returning to the vessel (Reply App. 1, Tr. 1665) as alleged in the owner's petition (App. 4) fell between the shipyard dock and the railbed of a marine railway (App. 76) where the yacht had been temporarily placed for repairs during the voyage (App. 73) and that the other seaman, Kurt Darr, jumped in to try to save him (App. 76) and that both drowned (App. 71). The district judge found that the decedents were seamen within the meaning of the Jones Act at the time of their deaths (App. 73, 77, 79); that access to the railbed from shore was hazardous, particularly at night which was when these seamen drowned (App. 75); that the lighting of the dock, walkway and railbed at the time of the drownings was insufficient (App. 77); concluded that an employer is liable under the Jones Act for the death of his seamen-employees proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel; that this duty extends to an area in close prox-

imity to the gangway such as the place where the seamen drowned (App. 79, 59) and that respondents, as the employer's personal representatives,* were liable to the claimants (App. 80-81).

The district court made the following finding with respect to contributory negligence:

> "Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and railbed and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death." (App. 77)

The district judge accordingly reduced petitioner's proven damages to $58, 527.49 (App. 82)

Atlass had been present at the vessel when it was placed upon the marine railway on October 23, 1956 (App. 17, 22, 26, 28) and knew, or had an opportunity to know, of the hazardous conditions for access both during the day and at night. (App. 30, 31, 49). On October 24, some 34 or 36 hours prior to the drownings, Atlass returned to Chicago. (App. 61) The district judge found that "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the dock and railbed as it existed at the time of the drownings" (App. 78) and allowed respondents limitation of liability to the value

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* H. Leslie Atlass, the owner of the vessel, died on November 18, 1960, (App. 1) which was after the Court's decision in *Miner* v. *Atlass,* 363 U.S. 641, but before the amendment to the Admiralty rules in 1961 permitting depositions as in Civil cases.

of the vessel, determining that petitioner's pro rata share was $18,422.13. (App. 78, 80, 83) The district judge explained "that is the basis of the conclusion that he wasn't responsible; that he had no privity or knowledge." (Tr. 1655-1657, Appellants' Brief 37, Petition for Rehearing 5)

Petitioner and Mollie Darr, administratrix of the estate of Kurt Darr, appealed to the United States Court of Appeals for the 7th Circuit contending as follows:

(a) The registered owner and master of a pleasure yacht who knew or had an opportunity to know of the hazardous conditions for ingress, and failed to do anything about them, but left the yacht and the crew in charge of his agent was not entitled to limit his liability merely because at the time of the drownings he was not physically present. *American Car & Foundry Co.* v. *Brassert,* 289 U.S. 261, *Coryell* v. *Phipps,* 317 U.S. 406; *Cortes* v. *Baltimore Insular Line,* 287 U.S. 367. (Appellants Brief 19, 24, 26, 32-35); (b) The petition for limitation of liability which failed to allege any want of privity or knowledge or any facts and circumstances from which such want of knowledge or privity could be found was insufficient. Rule 51 of the Supreme Court Rules of Practice in Admiralty and Maritime Cases (Appellants Brief 20, 26, 39-40); (c) An employer may not have a reduction of damages by reason of contributory negligence on the part of the decedent seamen when a cause of the seamen's deaths is the employer's failure to comply with a Coast Guard regulation providing that lifesaving equipment shall be readily accessible. *Kernan* v. *American Dredging Co.* (1958) 355 U.S. 426. (Appellant's Brief 20, 27, 41-43); (d) A seaman who in the company of his employer's agent and the chief engineer of the vessel becomes helplessly intoxicated and is taken

to the hazardous boarding area of the vessel in such helpless condition and falls in and drowns cannot, as a matter of law, be charged with contributory negligence, his own conduct being rendered remote by an intervening agency. *McDonough* v. *Buckeye Corp.*, 103 F. Supp. 473, aff'd (CA 6 1952) 200 F. 2d 558. (Appellants Brief 20, 29, 49-52); (e) Knowledge on the part of a seaman that to return to the vessel he would have to do so by a hazardous route, no safe way being provided, is not evidence of contributory negligence. *Smith* v. *United States* (C.A. 4 1964), 336 F. 2d 165 (Appellants Brief 28, 43); (f) Prejudgment interest may be allowed in admiralty cases with respect to that part of the damages based on loss of support to the date of judgment. *Petition of Midwest Towing Co.*, (N.D. Ill. 1962) 203 F. Supp. 727, 733, Aff'd (C.A. 7, 1963) 317 F. 2d 270. (Appellant's Brief 21, 29, 52-53)

A cross-appeal by respondents herein urged that the district court "fell into error in determining that there was any proximately causative negligence but that of Muth and Darr" (Brief of Appellees and Cross Appellants, p. 78). Answering the appeal, respondents urged "Privity and knowledge means more than mere negligence. It requires personal participation of the vessel owner and imports actual knowledge causing or contributing to the loss." citing *Rautbord* v. *Ehmann* (C.A. 7, 1951), 190 F. 2d 533, an opinion by Judge Major. (Brief of Petitioners-Appellees and Cross Appellants, pp. 39, 61)

The Court of Appeals, in an opinion by Judge Major, reversed the district judge on the cross-appeal and, drawing from language in maintenance and cure cases and relying on decisions in which the *trial* court had found no employer negligence held that the deaths of the two sea-

men "were the result solely of their own gross misconduct"; and held that the District Court erred in refusing to exonerate Atlass of all liability. (Appendix B, *infra*, p. 20a)

The second paragraph of the opinion of the Court of Appeals demonstrates its understanding of the basis of decision of the district judge, i.e., that Atlass was liable for the deaths of his seamen-employees proximately caused by his negligence in failing to provide a safe means of ingress to and egress from the vessel. (Appendix B, *infra*, p. 4a) However, subsequently, seizing on the "finding" that "Atlass *personally*, who was in Chicago, was without responsibility" which, the district judge explained was a conclusion that Atlass being in Chicago was without privity or knowledge, the Court of Appeals assumed that the district judge must have based his finding of liability solely on the negligence of the employer's agents in taking Muth in a helpless condition to the dock area. (Appendix B, *infra*, pp. 13a, 15a) The Court of Appeals held that such negligence on the part of the employer's agents could not be imputed to the employer as taking a helpless seaman back to his vessel was not within the scope of the agent's employment. *Robinson* v. *Northeastern Steamship Corp.*, 228 F 2d 679, 681. (Appendix B, *infra*, p. 14a)

The Court of Appeals observed parenthetically that "there was no proof that Muth was attempting to cross the gap" at the "unusual point" from which he entered the water. (Appendix B, *infra*, p. 9a)

The owner's petition had alleged that the drownings occurred while Muth and Darr were "apparently returning to the vessel." (App. 4) The only eyewitness to the occurrence was Smith, the chief engineer of the vessel

who was following three or four steps behind Muth and Darr, (App. 50-51, 76) and who testified that he did not know whether Muth was attempting to cross over to the marine railway platform or not. (App. 53) The 32 inch gap over which Muth had to cross to the railbed extended the entire length of the railbed and as the district judge observed "there were probably an infinite number of ways depending upon how you compute it, say you could get on anywhere on the whole starboard side from the walkway to the dock." (Supp. App. 119) While there were an infinite number of points from which to cross from the walkway to the railbed, none were found safe by the district judge. (App. 75) There was no gangplank spanning the 32 inch gap. (App. 18, 20, 32) There was no safe place to cross and no proper place indicated. (App. 75) There was no evidence that Muth entered the water at "an unusual place" or that there was a "customary place". He fell opposite a point between the first and second stanchions where there were no crossbars. Crossing from the next 15 feet along the walkway would have been more hazardous because of two crossbars intersecting at a height of 5½ feet, which were between the 15 inch wide stanchions. (App. 74)

The Court of Appeals found that particular aspects of the conditions which the district judge had found rendered access to the railbed from shore hazardous could not have contributed in whole or in part to the drownings. (App. B, *infra*, pp. 16a-18a). With respect to the obstructions on the railbed, scaffolding, debris and other litter which prevented safe access to the vessel by means of the inshore end of the railbed (Ex. 42, App. 75) (used when something heavy was being carried (Supp. App. 124)) and which may have caused Muth to be brought along the route usually taken which required the crossing of the 32 inch

unspanned gap, the Court of Appeals found that since the seaman did not attempt to return by the obstructed inshore end it could not have contributed in whole or in part to the drownings. (App. B, *infra*, p. 16a) The Court of Appeals found that neither the timbers and planks which were stacked on the walkway in the shadow of a wall, and which received no light (Supp. App. 97) and necessarily narrowed the walkway, nor the power line which lay across the walkway (Ex. 42, App. 17, 32), could have interfered with Muth or Darr as they proceeded together on the walkway on the east side of the gap. (App. B, *infra*, p. 17a).

The Court of Appeals also undertook to review some of the evidence with respect to the quality of light (App. B, *infra*, p. 17a) and contrary to the district judge's finding made its own finding that the illumination was sufficient for normal and ordinary use and that "no amount of illumination could have saved Muth and Darr from their own folly. That could have been accomplished only by placing a cover over the gap from end to end." (App. B, *infra*, p. 17a).

The finding of the district judge that the lighting was inadequate was based upon the testimony of two expert witnesses (Supp. App. 82, 149-150). The respondent's expert witness did not disagree as to the quantity of light available, nor the fact that the interior building lights, which were the only lights available and were not designed for exterior lighting (Supp. App. 149) being blocked by a wall, could not light the easterly three feet of the walkway (Supp. App. 97). His opinion was that highway and street rather than shipyard minimum lighting standards were appropriate, (Supp. App. 115-116) but such standards were not appropriate (Supp. App. 150).

Mendel, one of the crew members, testified that "there wasn't too much light that did come through the windows; (Supp. App. 25) that the light on the west margin of the dock and the east margin of the railbed "wasn't good, you know, distinct or plain"; "that you more or less took a step over, hoping you would make it" (App. 19). Wasilas, another crew member, testified that "the light was very bad"; (App. 24) that when he came off the boat in the unsuccessful rescue attempt he "heard Smith's voice in the darkness," that he went over to "where I heard the voice and Smith had a flashlight in his hand." (App. 25) Smith admitted that prior to the drownings he had used a flashlight going on and off the vessel. (Reply App. 2)

Yet the Court of Appeals found that there was no basis for a reasonable inference that insufficient lighting of the walkway was a cause, in whole or in part, of the fatal occurrence. (App. B, *infra*, p. 19a)

The Court of Appeals also found that two other seamen who jumped in the gap in an unsuccessful rescue attempt and did not drown had no difficulty in swimming to safety (although the water felt like an iceberg (App. 19) and one of them testified "It was difficult but we managed to get up" (Supp. App. 73)) and that this fact contrasted with the fact that Muth and Darr did drown in ten to fifteen feet of water (App. 74) required the "inescapable conclusion" that the drowning of the latter "was the result of their intoxicated condition, induced by their own voluntary acts." (App. B, *infra*, p. 20a)

In view of its conclusion that respondents were entitled to exoneration the Court of Appeals did not consider the other issues discussed in the briefs. (App. B, *infra*, p. 20a)

REASONS FOR GRANTING THE WRIT

1. The court below has decided a federal question in a way in conflict with the applicable decisions of this Court.

A fair examination of the record and analysis of the opinion of the Court of Appeals readily reveals that the Court failed to apply the standard of review required by *McAllister* v. *United States*, 348 U.S. 19, 20 and *Guzman* v. *Pichirilo*, 369 U.S. 698, 702.

Although the proofs justified with reason the findings of the district judge that employer negligence played some part in producing the deaths of Muth and Darr, the Court of Appeals drew its own inferences and own conclusions from the evidence and rejected evidence and reasonable inferences therefrom which substantially supported the district judge's findings.

This Court has been vigilant in overseeing decisions in which appellate courts have improperly reversed factual findings in Jones Act and F.E.L.A. cases. *Tennant* v. *Peoria & P.U. Railway Company*, 321 U.S. 29; *Penn* v. *Chicago & Northwestern Railway Company*, 335 U.S. 849; *Webb* v. *Illinois Central Railroad Company*, 352 U.S. 512, (the foregoing three cases being reversals of opinions below by Judge Major); *Wilkerson* v. *McCarthy*, 336 U.S. 53; *Rogers* v. *Missouri Pacific R.R. Co.*, 352 U.S. 500; *Harris* v. *Pennsylvania R.R. Company*, 361 U.S. 15; *Schulz* v. *Pennsylvania Railroad Company*, 350 U.S. 523; *Butler* v. *Whiteman*, 356 U.S. 271.

On occasion, this Court has exercised its oversight with respect to the findings of a district judge sitting in admiralty without a jury. *McAllister* v. *United States*, 348 U.S. 19, 20, *Guzman* v. *Pichirilo*, 369 U.S. 698, 702.

The Congressional scheme of legislation embodied in the Jones Act specifically guarantees the right of trial by jury. (App. A, *infra*, p. 2a) Yet an employer who is a vessel owner is in a position to circumvent that right and, until recently, the right to deposition discovery, through a proceeding for limitation of liability, heard by the court without a jury. Congress did not intend for Jones Act employers who happen also to be vessel owners to have the additional advantage of having unfavorable decisions retried before courts of appeal, certain of whose members persist in their refusal to accept this Court's view that the Jones Act and F.E.L.A. embody a system of federal statutory negligence law. It would be an anomaly if this Court limited its supervisory powers to protecting the integrity of a jury's verdict, but permitted a Court of Appeals to make its own findings when the findings of the district judge sitting in admiralty without a jury were not "clearly erroneous." This is a proper case for this court to "exercise its obligations to effectuate the present Congressional intention by granting certiorari to correct instances of improper administration of the Act and to prevent its erosion by narrow and niggardly construction."

The Limitation of Liability Act was never intended to become an "offensive weapon." *Lake Tankers Corp.* v. *Henn*, 354 U.S. 147, 152-153.

2. It is believed that the decision below is in conflict with an applicable decision of this Court in another respect:

In *Kernan* v. *American Dredging Co.*, 355 U.S. 426, 431, this Court held that even "in the absence of any showing of negligence, the Jones Act—which in terms incorporates the provisions of the F.E.L.A.—permits recovery for the death of a seaman resulting from the violation of a statutory duty."

An applicable Coast Guard regulation provided as follows:

> "The life saving equipment on all vessels shall be so placed as to be readily available." 46 C.F.R., §25.25-15(a)

The evidence established that there was no life saving equipment in the vicinity of the open space between the walkway and the marine railway. (App. 33) Two life rings which had been located on the starboard side of the vessel had been removed when the vessel was placed on the rail. (App. 21) What was said in *Sadler* v. *Pennsylvania R.R. Co.*, (C.A. 4 1947), 159 F. 2d 784 at 786, is peculiarly applicable:

> "One cannot escape the conclusion that the drowning of the decedent was a wholly unnecessary tragedy, and that, with decedent struggling in the water and calling for help and with a half dozen or more employees trying to help him, he could have been saved if adequate life saving equipment had been at hand. * * * The fact that there were life preservers in the crew's sleeping quarters and life rings on a hook on the bridge of one of the barges was not sufficient. They were out of the way and out of sight, twenty or more feet above the deck. They were not thought of in the excitement of the moment, whereas proper equipment on the deck would have been seen and used instead of the inadequate heaving line."

A reasonable construction of the Coast Guard regulation would require life saving equipment to have been at hand in the hazardous boarding area.

3. The court below has rendered a decision in conflict with a decision by another court of appeals in the same matter.

The court below holds: "Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated." (App. B, *infra*, p. 12a)

Muth was admittedly in a helpless condition when he left the tavern. Both courts below have found that this helpless condition was brought about by Muth's excessive drinking of intoxicating liquors and mindful of the "clearly erroneous" rule we must accept this as conclusive.*

Although, this finding may be conclusive, its legal effect is not:

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* Reluctantly, of course, as there was no medical evidence that his helplessness was caused by intoxication; there was evidence that Muth had back trouble aggravated by dampness (App. 69-70), had had a severe fall earlier in the voyage (Supp. App. 13, 59) and had fallen on the sidewalk after leaving the tavern (App. 57-58). The finding is contrary to the nature of the man (App. 63-64, 71) and contrary to the evidence as to his expenditures on the voyage (App. 67). The finding is based upon the testimony of Smith who preceded him to the tavern while he was in the movies and who permitted Muth in his helpless condition to return to the vessel and offered no assistance to Muth or Darr while they were on the walkway. (App. 52). The finding is also based upon the testimony of a waitress whose opinion was based upon what she saw through a restaurant window (App. 40-41) and upon the testimony of the night watchman who saw one of the seamen being held up by another at the dock. (App. 45-46). The finding is even more difficult to accept as to Darr as no one other than the waitress gave any testimony that he was drunk.

In *McDonough* v. *Buckeye Steamship Co.*, 103 F. Supp. 473, 477, Aff. 200 F. 2d 558, the United States Court of Appeals for the Sixth Circuit held that a helplessly drunken seaman, taken from a place of safety to his ship was in the course of his employment and his prior misconduct in becoming helplessly intoxicated was not a proximate cause of his death, there being an intervening agency. The Court rejected the contention "by defendant that the plaintiff is precluded from recovery because of decedent's own misconduct." This holding is in accord with decisions in *Black* v. *New York N.H. & H.R. Co.*, 193 Mass. 448, and *Panor* v. *Northwestern Elevated Ry. Co.*, 228 Ill. App. 162, which recognize that the prior conduct of the helplessly intoxicated person cannot, as a matter of law, be a proximate cause of his injury or death when an intervening agency acts with reference to such condition.

Even without an intervening agency other courts do not go so far as to hold that intoxication is contributory negligence as a matter of law. *Olson, Administratrix* v. *New York Central Railroad* (C.A. 2, 1965) 341 F. 2d 233.

In the *McDonough, Panor* and *Black* decisions the liability of the defendant was founded upon the negligence of the intervening agency which was imputed to the defendant. In this case liability is based upon the employer's failure to provide a safe means of ingress and not necessarily upon the negligence of his agents, but the difference does not alter the fundamental effect of the intervening agency in rendering the prior conduct a remote cause of the injury.

There being a clear-cut conflict between the Sixth and Seventh Circuits on the issue presents a special and important reason for granting the writ.

4. Important questions of federal law which have not been but should be decided by this Court are involved.

The opinion below states, "This perhaps is a pertinent point to make some observation as to the legal effect which the courts have given to the right of seamen to recover under the Jones Act for maintenance and cure or for damages or injuries sustained as are sought in the instant case. *We find no Supreme Court case which has directly decided the point in an action for damages.*" (App. B, *infra*, p. 9a) (Italics ours).

The court below seeking its guidance from maintenance and cure cases in which proximate cause is not of primary consideration holds that the decedent's "gross misconduct" bars recovery. The court refers to language of this Court in *Farrell* v. *United States et al*, 336 U.S. 511 which, when it reached here, was only a maintenance and cure case. But even the dicta of this Court in that case upon which the Court of Appeals relied refers to employee conduct "at the moment of injury" and indicates that principles of proximate cause in Jones Act cases have not been eroded. If this be the fact it should be made clear by an opinion of this Court.

The subsidiary questions involve important issues deserving the attention of this Court, and as to which the lower courts need guidance.

(A) The Limitation of Liability Act.

(1) This Court said in *American Car and Foundry Company* v. *Brassert*, 289 U.S. 261, 264:

> "The liability thus limited is an imputed liability; it is a liability imputed by law by reason of the ownership of the vessel. For his own fault, neglect, and contract the owner remains liable. *Richardson* v. *Harmon*, 222 U.S. 96, 103-106; *Pendleton* v. *Benner*, 246 U.S. 356.

But in *LaBourgogne,* 210 U.S. 95, 122, this Court had said,

> "Negligence pure and simple, in and of itself, does not necessarily establish the existence on the part of the owner of a vessel of privity and knowledge within the meaning of the statute."

These two statements have caused confusion in the lower courts. See *The Virginian* 264 Fed. 986, 996-997, and *Rautbord* v. *Ehmann,* C.A. 7 190 F. 2d 533, 537-538 relied on by respondents for the proposition that "privity and knowledge means more than mere negligence. It requires personal participation of the vessel owner and import actual knowledge causing or contributing to the loss." (Brief of Petitioner-Appellees and Cross-Appellants, p. 39, 61).

The district judge admitted his own confusion, saying "I will tell you, for what it is worth, that the issue of limitations is one on which I think I spent as much or more time, my law clerk and I, on as any, and I am satisfied that an absent shipowner, who, on this record, never saw the conditions at midnight or 2:00 o'clock in the morning, [It was established by respondent's own witness, Atlass' son, that he had been present after dark (App. 49)] who I think could not reasonably be held to have known that there were conditions that were less than adequate for safe ingress and egress, is not *personally* liable." (Emphasis ours)

"Negligence in Jones Act cases (sic)* has to be something more positive, more direct and more proximate in my judgment, than Mr. Atlass in Chicago, at the time when an accident occurs. It is a combination cause of the conditions of the individuals and the conditions of the premises,

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* As the district judge determined that there was Jones Act liability but allowed limitation he obviously was still referring to the Limitation of Liability Act.

of which the record indicates at most he had some knowledge some thirty-six hours earlier or thirty-four hours earlier." (App. 60-61)

(2) Another issue deserving the attention of this Court is whether the requirement of Rule 51 of this Court's Admiralty rules that the petition for limitation of liability shall set forth the facts and circumstances upon which limitation is claimed is met by a petition which failed to allege either a want of privity or knowledge or any facts from which such a want of privity or knowledge can be found.

(B) Pre-Judgment Interest. Pre-judgment interest is not allowed in Jones Act cases on a jury verdict but pre-judgment interest has been allowed in Admiralty cases by the Court sitting without a jury. *Petition of Mid-West Towing Company,* 203 F. Supp. 727, 733, aff'd C.A. 7, 1963, 317 F. 2d 270; *Petition of New York,* C.A. 2, 1964, 332 F. 2d 1006; Cf. *National Airlines* v. *Styles,* C.A. 5, 1959, 268 F.2d 400; *Moore-McCormick Lines, Inc.* v. *Richardson,* C.A. 2, 1961, 295 F.2d 583. See dissent in *Powers* v. *New York Central Railroad Company,* (C.A. 2, 1958), 251 F.2d 813, 818-819. It would be appropriate for this Court to rule whether it is proper to allow pre-judgment interest in a limitation of liability proceeding in admiralty on a Jones Act claim.

CONCLUSION.

For the foregoing reasons a petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — STATUTES AND REGULATION

1. Statutes

46 U.S.C. §183 (a)

"The liability of the owner of any vessel, * * * for any act, * * * done, occasioned, or incurred, without the privity or knowledge of such owner or owners, shall not * * * exceed the amount or value of the interest of such owner in such vessel, and her freight then pending." R.S. §4283; Aug. 29, 1935, c. 804, §1, 49 Stat. 960; June 5, 1936, c. 521, §1, 49 Stat. 1474.

46 U.S.C. §187

"Nothing in sections * * * 183 * * * of this title shall be construed to take away or affect the remedy to which any party may be entitled, against the master, officers or seamen, for or on account of * * *any negligence * * * of such master, officers, or seamen, respectively, nor to lessen or take away any responsibility to which any master or seaman of any vessel may by law be liable, notwithstanding such master or seaman may be an owner or part owner of the vessel." R.S. §4248.

46 U.S.C. §688

"Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in the case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office

is located." Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007.

45 U.S.C. §51

"Every common carrier by railroad, while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; * * *, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency due to its negligence, in its * * * boats, wharves or other equipment.

"Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter." Apr. 22, 1908, c. 149, §1, 35 Stat. 65; Aug. 11, 1939, c. 685 §1, 53 Stat. 1404.

45 U.S.C. §53

"In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee: *Provided*, That no such employee who may be injured or killed shall be held to have been guilty of contributory negligence in any case where the violation by such common carrier of any

statute enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §3, 35 Stat. 66.

45 U.S.C. §54

"In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statutes enacted for the safety of employees contributed to the injury or death of such employee." Apr. 22, 1908, c. 149, §4, 35 Stat. 66; Aug. 11, 1939, c. 685, §1, 53 Stat. 1404.

2. Regulation

46 C.F.R., §25.25-15 (a)

"The life saving equipment on all vessels shall be so placed as to be readily accessible."

APPENDIX B

OPINION OF COURT OF APPEALS

June 30, 1965

Before KILEY, SWYGERT and MAJOR, *Circuit Judges.*

MAJOR, *Circuit Judge.* This proceeding in Admiralty was initiated by H. Leslie Atlass as the owner of the yacht "Sis," under the Limitation of Liability Act (46 U.S.C.A. Secs. 183-189) and Rules 51-54 of the Rules of Practice in Admiralty and Maritime Cases, for exoneration from or, in the alternative, limitation of liability under the Jones Act (46 U.S.C.A. Sec. 688), for the death by drowning of two seamen, Clem Muth and Kurt Darr. Their representatives appeared as claimants and answered the petition. Subsequently, petitioner died and the executors of his estate were substituted as parties. (In this opinion we shall use the term "petitioner" rather than the names of his substituted parties.)

The District Court, after a lengthy trial without a jury, made extensive findings of fact and entered its conclusions of law. It concluded among other things that Atlass as an employer was liable for the deaths of the two seaman-employees which allegedly were proximately caused by the employer's failure to provide a safe means of ingress to and egress from the vessel. The Court also concluded that Muth and Darr were in part responsible for their deaths by reason of their own negligence. The Court, therefore, in summary held that petitioner was not entitled to exoneration but to a limitation of liability. In other words, it concluded there was negligence on the part of Atlass and contributory negligence on the part of Muth and Darr. Based on these conclusions an award of damages was made to the representative of each of claimants' estates.

From the Court's conclusion, embodied in its judgment, that petitioner was entitled to a limitation of liability, claimants appeal. From its conclusion, also embodied

in its judgment, denying exoneration to petitioner, the latter cross-appeals.

While perhaps evident, we think it pertinent to note that if petitioner was entitled to exoneration, the issue as to limitation of liability is of no consequence. As the Court stated in The 84-H, 296 Fed. 427, 431 (C.A. 2):

> "The whole doctrine of limitations of liability presupposes that a liability exists which is to be limited. If no liability exists there is nothing to limit. And in a proceeding to limit liability two duties are imposed upon the court. The first is to ascertain whether any liability exists. If it is found to exist the second duty arises, which is to ascertain whether the loss or damage was occasioned or incurred without the 'privity or knowledge' of the owner of the ship. If no liability is found to exist, the absence of all liability is to be decreed, and there the matter ends."

To the same effect see *Rautbord* v. *Ehmann*, 190 F.2d 533, 537 (C.A. 7).

It appears appropriate in the beginning to make a brief summary of the pleadings. The petition among other things alleged that petitioner was the owner of a certain vessel of the United States known as the yacht "Sis," of the registered dimensions of 101.5 feet in length, 19.2 feet in breadth and 11.1 feet in depth, and of 131 gross and 89 net registered tonnage, with home port at Chicago, Illinois, and that at about 3 a.m. on October 26, 1956, while the "Sis" was within the Admiralty and Maritime jurisdiction of the United States, upon a certain drydock in the harbor at Detroit, Michigan, Clem Muth and Kurt Darr dropped or jumped into open water in a gap between the shipyard dock and the drydock, and drowned, while apparently returning to the yacht after spending the evening and early morning ashore.

The petition alleged that petitioner at all times exercised due diligence to make the vessel seaworthy and

in all respects fit for the uses and purposes for which she was used; that the deaths of the said Muth and Darr were in nowise caused by the fault of the "Sis" or the persons in charge of her, or of petitioner or any other person for whose fault or neglect petitioner might be responsible, but was the direct and immediate result of the fault of Muth and Darr, or the result of inevitable accident. The petition further alleged that Catherine Eleanor Muth as administratrix of the estate of Clem Muth had brought an action in the District Court against petitioner, claiming damages under the Jones Act (46 U.S.C.A. Sec. 688) in the amount of $250,000.00, and that petitioner had reason to believe that the personal representative of Kurt Darr, deceased, would commence an action against petitioner arising out of the same casualty.

The representatives of Muth and Darr (claimants) answered the petition, denying its material allegations. Muth's answer alleged that the death of Clem Muth was the immediate and proximate result of the negligence and careless acts of petitioner, his agents, servants, workmen and employees, occasioned and incurred with the fault, privity and knowledge of petitioner in carelessly permitting certain unsafe and dangerous conditions to prevail, in failing to provide safe and proper equipment on said vessel and in failing to take reasonable precautions to provide safe working conditions. Among the acts of negligence alleged were that petitioner "Negligently failed to provide a reasonably safe place to work, a safe means of ingress to and egress from the vessel, a gangplank or other safe means of leaving or boarding the vessel, adequate and proper illumination or light in the boarding area." (Other acts alleged appear to be embodied in those stated.)

Darr's answer was substantially the same as that of Muth, alleging that his death was caused by the negligence of petitioner, his agents and servants.

We shall first make an abbreviated statement of the facts as found by the District Court. On October 18, 1956, the yacht "Sis" left Belmont Harbor in Chicago, bound for Florida. Among those aboard were H. Leslie

Atlass, vice president of CBS in charge of its Chicago office, the registered owner of the yacht; Muth and Darr; Frank E. Johnson a purchasing agent employed by CBS; Raymond Mendel, acting first mate, employed by Atlass; Robert L. Smith, engineer of the yacht, employed by Atlass, and John Wasilas, a painter employed by CBS.

On October 22, 1956, after having been stranded in the St. Clair River for two days, the yacht proceeded under her own power to the Detroit Basin, Inc., a shipyard in the Detroit River. On October 23, she was there placed on a marine rail and lifted out of the water to facilitate an inspection for damages, if any, resulting from the grounding. The yacht remained on the marine rail until after Muth and Darr drowned.

The marine rail was 101′ long and 34′ wide. Along the north (or inshore) end, it was level with the dock and there was a place 10′ wide to walk onto the marine rail bed without stepping across any gap. The yacht faced north in its position on the marine rail. On the eastern edge of the rail bed there were eight stanchions lined in a north-south row 13′ apart. The base of each stanchion was 15″ wide. Between the second and third, and also between the seventh and eighth, stanchions, from the north, there were steel crosspieces, each an inch in diameter, which crossed at a height of 5½′.

Immediately east of the eastern edge of the rail bed was a 32″ gap, below which there was water. At a point opposite the mid-point between the first and second stanchions (from the north) the water was 10 to 15′ deep. Immediately east of the eastern edge of the rail bed, after the gap, was a walkway about 5′ wide which extended north and south for a distance of 65′. The level of this walkway was approximately 2″ below the rail bed. Preparatory to doing repair work on the yacht, scaffolding was erected by the shipyard company on the starboard side and at her bow. While the yacht was on the marine rail, toilet and cooking facilities on board could not be used. Members of the crew slept on the yacht, although Johnson and Darr occasionally stayed on shore in a hotel.

Two means of ingress and egress were available, (1) a ladder between the rail bed and the gangway on the starboard side slightly forward of midship, which necessitated stepping across the gap, and (2) the north end of the rail bed which abutted the dock where there was no gap (inshore route). Abutting the east edge of the walkway was a boat shed, the west wall of which was 24′ high, all glass except for a 4′ concrete base. Inside the shed there were two north-south rows of ceiling light fixtures, four fixtures to a row.

While the yacht was on the marine rail or before, Atlass (petitioner) was joined by his son, Atlass, Jr., and his daughter, Harriet. On the morning of October 24, Atlass and members of his family left for Chicago, leaving Johnson in charge. Atlass was not again present at the yacht until after the fatal occurrence.

We now come to the events of the night of October 25, which culminated in the fatalities at about 3 o'clock the following morning. At about 7 p.m. (after dark), Smith, Mendel, Johnson, Wasilas, Muth and Darr went ashore to eat. The group left by the route they had most frequently taken, going from the vessel gangway down the ladder on the marine rail platform and then stepping across the gap to the walkway. This was at a point about 50′ from the north end of the walkway where there was an entrance from the boat shed. The party could have used the inshore route that night, where it was not necessary to cross any water. Everyone, including Muth and Darr, had used the inshore route on previous occasions, both in daylight and dark. Mendel returned to the ship at about 8 p.m., and Wasilas at about 9 p.m.

After dinner, Johnson, Muth and Darr went to a movie, then to a tavern known as Garvin's Bar where they found Smith and took turns ordering rounds of drinks. Muth was drinking straight whiskey with beer chasers. The bar stopped serving drinks at 2 a.m., and shortly thereafter Muth, Darr and Smith left, having been in the tavern three hours. A few minutes later they appeared at the boat shed through which they must pass in returning to the yacht.

Gildersleeve, who had been the night watchman for thirteen years, unlocked the shed, turned on the overhead lights and permitted the three men to pass through. Darr was attempting to hold Muth as they went through the door, three or four steps ahead of Smith. As they emerged on the walkway, Darr was holding Muth up. They could have gone straight ahead and reached the rail bed by the inshore route, but instead they turned left and started down the walkway. About 15′ from the door of the boat shed, Muth fell into the gap between the walkway and the marine rail platform. Darr jumped in right behind him. They both drowned. (There was no proof that Muth was attempting to cross the gap at that unusual point.)

While the degree of intoxication of Muth and Darr at the time of the fatal occurrence is highly important, we need not burden this opinion with a detailed recital of the testimony bearing thereon. The Court found:

> "Muth and Darr were, in part, responsible by reason of their own negligence for their deaths. Both had been drinking alcoholic beverages immediately prior to the drowning, Muth having consumed substantially more than Darr. Both men knew or had reason to know of the debris and other obstacles on the walkway, dock and rail bed, and of the gaps, differences in levels and poor lighting. Muth's negligence was a 50% factor in causing his death, while Darr's negligence was a 30% factor in causing his death."

This is a tepid finding insofar as it relates to the degree of their intoxication. The proof discloses beyond question that Muth, when he left the tavern and at the time he fell into the gap, was intoxicated to the extent that he was in a stupor, and Darr was in a staggering condition. Just outside the tavern, while Smith and Darr were attempting to hold Muth up, he fell on the curb and skinned his knees and the side of his head. Their demeanor after they were in the water, as subsequently shown, strongly corroborates the direct proof as to the helpless condition of one and the near-helpless condition of the other.

This perhaps is a pertinent point to make some observations as to the legal effect which the courts have given to the right of a seaman to recover under the Jones Act for maintenance and cure or for damages for injuries sustained, as are sought in the instant case. We find no Supreme Court case which has directly decided the point in an action for damages. However, *Farrell* v. *United States, et al.*, 336 U.S. 511, throws some light on the issue and it is pertinent because it contrasts the rights of the seaman under the two forms of action which are sometimes confused. In that case, the seaman sought to recover on both theories. The trial court sustained his action for maintenance and cure but dismissed it for damages. The Court of Appeals affirmed, *Farrell* v. *United States, et al.*, 167 F. 2d 781. The Supreme Court, in affirming the Court of Appeals, referred to a previous opinion and stated (page 515):

> "In *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, the Court pointed out that logically and historically the duty of maintenance and cure derives from a seaman's dependence on his ship, not from his individual deserts, and arises from his disability, not from anyone's fault. We there refused to look to the personal nature of the seaman's activity at the moment of injury to determine his right to award. Aside from *gross misconduct* or insubordination, what the seaman is doing and why and how he sustains injury does not affect his right to maintenance and cure, however *decisive it may be as to claims for indemnity or for damages for negligence.* [Italics supplied.]"

Thus, the Court indicates that gross misconduct, and we think the conduct of Muth and Darr must be so characterized, may be decisive in an action for damages based on negligence.

In *Wiper* v. *Erie Sand Steamship Co.*, 293 F. 2d 491, the Court affirmed the dismissal of a Jones Act case brought on the theory that the shipowner was negligent in permitting the seaman to go ashore when he was in a drunken condition. In rejecting the theory, the Court stated (page 493):

"Whatever the 'parental' duty of a ship's captain may be, it surely does not require him to forcibly detain every crew member who has had a few drinks or who wishes to go ashore to do a bit of drinking for relaxation."

In *Schlichter* v. *Port Arthur Towing Company*, 288 F. 2d 801, in a damage action for the death of a seaman by drowning when he fell overboard, the Court sustained a judgment in favor of the vessel owner. The Court cited cases in support of the general rule that intoxication only mitigates damages but (page 803), "Of course, the result is different if the seaman's negligent intoxication is the sole cause of the injuries."

In *Barlow* v. *Pan Atlantic S.S. Corp., et al.*, 101 F. 2d 697, the Court affirmed a judgment denying the right of a seaman to recover maintenance and cure because of injuries sustained as a result of falling from a ladder while intoxicated.

In *The S.S. Berwindglen, Rawding* v. *Hooten*, 88 F. 2d 125, the Court sustained a judgment denying a claim for maintenance and cure for injuries sustained in attempting while intoxicated to climb a ladder leading to the dock.

Another case to be noted because of its similarity of facts is *Landy* v. *United States, et al.*, 101 F. Supp. 486. The action in Admiralty was brought by decedent's representative to recover damages under the Jones Act for a seaman's death occasioned by injuries sustained when he fell from a ladder while attempting to board a vessel. The owner was charged with negligence in failing to provide a safe means of ingress by reason of the defective condition of the ladder. The Court found that the seaman became intoxicated while ashore and returned to the vessel in that condition. Notwithstanding the Court's finding that the ladder was defective as alleged, it dismissed the claim on the basis that the seaman fell solely because he was intoxicated.

Prior to a consideration of the findings which form the basis for the Court's judgment against Atlass, we refer to

an issue of importance, that is, whether Muth and Darr at the time of their deaths were engaged "in the course of their employment," a prerequisite to the right to maintain an action under the Jones Act. The issue is further in the case because of claimants' contention that Johnson and Smith, with knowledge of the intoxicated condition of Muth and Darr, were negligent in permitting them to return to the yacht and that such negligence was imputable to Atlass.

In *Braen* v. *Pfeifer Oil Transportation Co., Inc.*, 361 U.S. 129, 133, the Court stated:

> "Petitioner was acting 'in the course of his employment' at the time of the injury, for at that moment he was doing the work of his employer pursuant to his employer's orders."

Assuming that Muth and Darr were in the course of their employment while departing from the yacht for the purpose of obtaining their meals and returning thereto in the normal manner, it certainly is a far-fetched idea that they continued in such course when they took to themselves the liberty of spending three near-midnight hours in a tavern consuming intoxicating liquors. Neither do we think that such relationship was restored when they attempted to return to the yacht, one in a drunken stupor and the other badly intoxicated.

Claimants attempt to meet this problem with the argument that the intoxicated condition of Muth was evident to Atlass' agents Johnson and Smith; that such agents were negligent in permitting his return to the ship; that they were acting within the scope of their employment in so doing and that such negligence was imputable to Atlass. We think this argument is without merit. Pertinent to this point is the Court's finding:

> "Early in the evening of October 25, 1956, Muth, Darr, Mendel, Smith and Wasilas, among others, were taken to dinner by Johnson. Thereafter, Mendel and Wasilas returned to the yacht. Smith went to a tavern called Garvin's Bar where he was joined later

by Muth and Darr. The three men remained until shortly after 2 a.m., and during this period Muth and Darr consumed alcoholic beverages."

In the first place, there is no finding that Johnson had knowledge of the intoxicated condition of the two men. There is testimony that he went to the tavern with Muth and Darr, where they joined Smith and had some drinks. Later, time not disclosed, Johnson left the party and returned to his hotel. Thus, the most that is shown as to Johnson is that he knew they were in a tavern drinking intoxicating liquors. He did not accompany and had nothing to do with the return of Muth and Darr to the ship. On what theory he could be found negligent is not discernible.

Assuming, without a finding, that Smith was negligent in accompanying and permitting Muth and Darr to return to the ship, such negligence could not be imputable to Atlass because Smith's activities, both affirmative and negative, were not within the scope of his employment. Certainly he was without authority and it was no part of his duties to protect drunk men in returning to the ship or to prevent them from so doing.

Claimants cite only one Federal case, *McDonough* v. *Buckeye S.S. Co.*, 103 F. Supp. 473, affirmed 200 F. 2d 558 (C.A. 6), in support of their theory that Atlass is liable because of the negligence of his agents in taking Muth and Darr to the ship, a place of asserted danger. A comparison of the facts of that case with those here demonstrates that it is of no benefit to claimants. There, the ship owner knew that it was a regular procedure on his ship for a seaman to get drunk ashore and to be brought back to his ship by others of his crew and, with that knowledge, the owner had acquiesced in the practice. In fact, the ship owner employed a guard at the gate who was charged with the duty of refusing admission to seamen returning in an intoxicated condition. The guard placed another employee in charge of the drunken sailor for the purpose of escorting him to the ship. Instead of discharging his responsibility, the other employee, mid-

way on the journey, abandoned the intoxicated sailor, who later was found drowned. The Court under those circumstances properly held, we think, that the ship owner was responsible for the negligence of its employees who were acting under specific directions and thus undoubtedly in the course of their employment.

Any doubt as to the holding in *Buckeye* is dispelled by *Robinson* v. *Northeastern Steamship Corp.*, 228 F. 2d 679 (C.A. 2), in which an action for damages under the Jones Act was dismissed. The Court stated (page 681):

> "There [referring to Buckeye] the shipowner was held liable for the death of a drunken seaman who was drowned, when returning from shore leave, through the negligence of a shipmate who had undertaken to assist him to the vessel. In that case in assisting his shipmate the negligent sailor was acting in accordance with a long-standing custom, which had been recognized and approved by the shipowner, and consequently he was considered as acting within the scope of his employment. In the case at bar there was no proof that Woods' actions were requested or authorized by the defendant or were in accord with a custom recognized by the defendant. Without such authorization Woods was not acting within the scope of his employment, and his negligence, if any, in performing his voluntary undertaking could not be imputed to the defendant even if successful performance would further the interests of the shipowner."

The Second Circuit as late as 1963, in a Jones Act case approved of the decision in *Robinson* and reversed a judgment in favor of the claimant (a seaman). *Trost* v. *American Hawaiian Steamship Co.*, 324 F. 2d 225. As to *Robinson* the Court stated (page 228):

> "Although willing to assume that the assisting seaman was negligent and that the plaintiff's decedent was killed while in the course of *his* employment, this court refused to hold the shipowner responsible. Rather, we held in *Robinson* that the particular act

performed negligently, aiding an intoxicated seaman to return to his ship, was not within the scope of the negligent seaman's employment. [Citing cases.]"

Preliminary to a consideration of the findings relating to petitioner's negligence, it is pertinent to observe that there is no finding of negligence on the part of any person except Muth and Darr. As to Atlass, the Court found:

> "Atlass personally, who was in Chicago, was without responsibility for the hazardous condition of the walkway, dock and rail bed as it existed at the time of the drownings."

Taking this finding at its face value, it would appear to exonerate Atlass from all responsibility for the asserted negligent conditions existing at the time of the occurrence. It may be that the Court while finding that Atlass was not personally responsible thought he was liable because of negligence of others imputable to him. If such be the thinking, there was, as noted, no finding that Johnson, left in charge of the ship when Atlass returned to Chicago, was negligent, and there is no finding that any other employee or agent of Atlass was negligent. It seems that if petitioner is to be held liable on an imputable negligence theory, he is entitled to know by whose negligence and of what it consisted.

In considering the findings as they concern the issue of petitioner's negligence, we recognize, without the citation of authority, two well established principles of law, (1) that an employer has a duty to provide seamen in his employment with safe and seaworthy appliances and a safe place to work, including a safe, adequately lighted means of ingress and egress to and from the vessel, and (2) that the burden of proof under the Jones Act to show negligence causally relating to the accident is on the seaman or his representative. Negligence is not presumed but must be affirmatively proved.

The findings as they relate to negligence, other than those already referred to, are:

"No. 27. Access to the rail bed from shore was hazardous, particularly at night, whether it was accomplished from the walkway, by stepping across the gap, or from the dock where it was flush with the rail. Part of the five foot width of the walkway was obstructed by timbers and planks. The east side of the rail bed was made dangerous by the gap, the difference in its level as compared with that of the dock, and the presence of scaffolding, stanchions and cross bars; in addition, the rail bed was cluttered with ropes and planks. The north side of the rail bed, along part of which there was no gap, also was obstructed by scaffolding and littered with ropes and planks. The route most frequently taken from shore to the rail bed was along the walkway and across the gap."

"No. 39. Considering the debris and other obstacles on the walkway, dock and rail bed, and the hazards created by the gaps and differences of levels, the lighting of the walkway, dock and rail bed at the time of the drowning was insufficient."

As already noted, there is no finding or conclusion by the Court that the condition portrayed by these findings was due to the fault or negligence of Atlass, Johnson or any other employee; in fact, the Court found that Atlass was not personally responsible. The stanchions and crossbars referred to were a part of the permanent rail bed structure. The shipyard company constructed the scaffolding preparatory to doing repair work on the yacht, and it was also responsible for the ropes and planks on the rail bed.

Assuming, absent a finding, that there was negligence on the part of petitioner's employees in permitting these so-called obstructions on the rail bed (west) side of the gap, they could not have contributed in whole or in part to the tragedy because Muth and Darr were on the walkway on the opposite (east) side of the gap when they fell or jumped into the water.

That portion of the findings that the walkway was obstructed by timbers, planks, debris and other obstacles is without substantial support. The only testimony we find in this respect is that there were some planks on the walkway, and the photographs offered by claimants show that they were piled in order in their usual place on the east side of the walkway, against the wall of the boat shed. These planks were a part of the facilities furnished by the shipyard company for use by seamen if needed in bridging the gap between the walkway and the rail bed. They were never used by any of petitioner's seamen, including Muth and Darr, because their use was not thought necessary. In any event, the presence of these planks bore no relation to the occurrence. Muth and Darr made no attempt to return to the ship along the north side of the rail bed where there was no gap. When they left the boat shed accompanied by Smith, they turned left and proceeded south along the walkway, headed for the point across the gap from the ladder. As the Court found, this was the route most frequently taken from shore to the rail bed. There is no proof and no claim that there was any obstacle on the walkway which interfered in any manner with Muth and Darr as they proceeded along the walk on the east side of the gap.

The Court's finding that "the lighting of the walkway, * * * at the time of the drowning was insufficient" is of a conclusory nature, based upon the opinion testimony of claimants' expert witnesses. Petitioner's expert witness expressed his opinion that the illumination on the walk was sufficient for the purpose of its use. These witnesses seemed to be in substantial agreement that the illumination was equal to that furnished to pedestrians on Chicago streets. The proof by witnesses who had personal knowledge of the condition is overwhelming that the illumination was sufficient for normal and ordinary use. No amount of illumination could have saved Muth and Darr from their own folly. That could have been accomplished only by placing a cover over the gap from end to end.

Smith, the only eye witness, testified that the point of the occurrence was about midway between the entrance to the walkway and the ladder, which had been in the same place since the yacht had been on the rail bed. He stated that "the lighting was good enough you could see to get around in out there because it was shining right through the glass on the platform out here and the walkway"; that he had been with Muth and Darr on previous occasions when they were crossing the gap between the walkway and the rail bed, and that they had no difficulty in seeing. Milton Pinkstaff testified that he had been employed by the shipyard as a carpenter for some fourteen years, that the rail bed had remained in the same position during that time and that the gap was easy to step across. He arrived at the scene of the occurrence at about 3 a.m., and stated that there were no hoses, ropes or debris on the walkway, that the lights in the boathouse were on and that the lighting conditions were very good. Morton Gildersleeve testified that he had been employed by the Detroit Basin as a night watchman from 1948 to 1961, that when on duty he stepped across the gap two or three times each night and that during his employment no person other than Muth and Darr had fallen into the gap. He observed no debris of any kind on the walkway and stated that the lighting conditions were good. All members of the crew, including Muth and Darr, in daytime and at night, had stepped over the gap many times in leaving and returning to the yacht. Atlass' daughter testified that with her tight skirt and high heeled shoes it was an easy step. Raymond Mendel, a witness for claimants, testified, "There wasn't too much light that did come through them windows. It was like early evening, just between dark and evening, you know dusk." He admitted that flashlights were available on the yacht but were rarely needed. In a pre-trial statement, the witness said, "That was an easy step and I am sure everybody who was on the yacht and who I have mentioned, including Mr. Atlass' daughter, Sis, who was a girl in her teens, stepped across the gap without any trouble. I know that I saw Muth and Darr go onto the platform in both ways I have described."

The Court made no finding that insufficient lighting of the walkway was due to the negligence of Atlass or any of his employees or that it was the cause, in whole or in part, for the fatal occurence. We think there is no basis for a reasonable inference that it was. The misconduct of claimants' decedents was solely responsible for their unfortunate demise.

In *Jackson* v. *Pittsburgh S. S. Co.*, 131 F.2d 668, the Court affirmed a judgment denying to a seaman a claim for damages under the Jones Act. It was there alleged that the boat owner was negligent in his failure to furnish a ladder or any other means of ingress and egress. The seaman desired to go ashore, jumped from the deck of the vessel to the dock, a distance of about six feet and sustained the injuries complained of. The Court assumed that the owner was negligent in failing to provide a ladder but denied recovery because the misconduct of the seaman was the sole cause of his injuries. In doing so the Court stated (page 670):

> "When a seaman, by his own volition, creates an extraneous circumstance, he brings about an intervening cause that directly affects his relation to his employers and to the ship. He is responsible for such intervening cause if it consists of his own wilful misconduct, is something which is done in pursuance of some private avocation or business, or grows out of relations unconnected with the service or is not the logical incident of duty in the service. [Citing cases.]"

See also *Meintsma* v. *United States*, 164 F.2d 976, 977.

In conclusion, it seems in order to make a brief statement of the undisputed facts relative to the conduct of Muth and Darr after they were in the water. Smith who was unable to swim stepped to the gap, knelt down and directed his flashlight therein. He saw Darr trying to help Muth, but Muth was throwing his arms around and fighting Darr. Smith lay on the walkway with his left hand down into the gap about three or four feet. He braced himself with his right hand on the rail platform. Smith

shouted several times for them to grab hold of his hand, and if either had reached up he could have done so, but neither did. Gildersleeve, the night watchman was at the scene in a few minutes and saw Smith dangling a rope, trying to get Muth to grab it, holding it right in front of Muth's face between his outstretched arms. The rope actually came in contact with Muth's head and body but he did not take hold of it. Gildersleeve placed a ladder in the water but Muth would not take hold.

Mendel and Wasilas were asleep on the boat when they heard cries for help. Both came to the platform and jumped into the water in an effort to save Muth and Darr. At that time the latter had disappeared. They tied a tight line around Muth's body and gave the end of it to Smith. They then swam underneath the dock into the boat shed and climbed out of the water. Smith held Muth out of the water until their return. When they attempted to pull him from the water, he slipped through the loop and was not seen again.

Muth and Darr were middle-aged men, healthy and vigorous, and both were swimmers. The conclusion is inescapable that their total inability to aid themselves or each other after they were in the water was the result of their intoxicated condition, induced by their own voluntary acts. In contrast, Mendel and Wasilas, who were sober, were in the water for some ten minutes and had no difficulty in swimming to safety.

In our judgment, and we so hold, the deaths of Muth and Darr were the result solely of their own gross misconduct. It follows that the Court erred in its refusal to exonerate Atlass of all liability for loss or damage occasioned thereby. In view of this conclusion, other issues discussed in the briefs need not be considered.

The judgment is reversed and the cause remanded for such further proceedings as are not inconsistent with this holding.